In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue an opinion. The opinion of the court of appeals (Pet. App. A, pp. 32-35) is reported at 450 F.2d 125.

JURISDICTION

The judgment of the court of appeals was entered September 23, 1971, and a timely petition for rehearing with a suggestion for rehearing *en banc* was

denied on December 9, 1971 (Pet. App. A, p. 46). The petition for a writ of certiorari was filed on January 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed.

STATEMENT

The United States brought this condemnation action to acquire petitioner's leasehold interest in an 0.75-acre parcel at Almota, Whitman County, Washington, in connection with the Little Goose Lock and Dam river improvement and navigation project on the Snake River. The district court entered judgment based on petitioner's theory that it was entitled to receive as compensation the value of its improvements computed without regard to the remaining term of its lease. The court of appeals reversed and, in accordance with the government's contention, directed that judgment be entered based on a value determined with reference to the remaining lease term (Pet. App. A, pp. 32-45).

The pertinent facts are undisputed and are set forth fully in the court of appeals' opinion. The government sought to obtain all rights to the property in issue. Prior to bringing this suit it settled with the fee

owner, the Oregon-Washington Railroad and Navigation Company. The terms of that settlement were not brought out or urged as relevant in the present action. (Pet. App. 33-34.)

Petitioner leased the land from the Railroad under a twenty-year written lease, covering the land only, at an annual rental of $114.20. It had built on the land a 522,500-bushel grain elevator and another, complementary building. Petitioner had no right to renew the lease; it was obligated to remove its improvements within six months of the expiration of the lease term, failing in which the Railroad owned them and could remove them at petitioner's expense. (*Ibid.*; Pet. App. B, p. 55.)

The parties stipulated that petitioner had occupied this land for many years, that a renewal of the existing lease by the Railroad could be expected, and that, as a result, prospective purchasers were willing to pay more for a leasehold interest such as petitioner's than the value of the bare legal rights owned (Pet. App. B, p 56). Petitioner claimed that in these circumstances it was entitled to compensation measured by the remaining useful life of its improvements and what it could expect to sell its leasehold interest for, without limitation on the basis of the remaining lease term. The government contended, on the other hand, that the possibility that petitioner's lease might be renewed was not a proper component in determining just compensation, and that petitioner was entitled to receive only the value of the use of the land and buildings for the remaining lease term, plus the removal value of the buildings. It was agreed that un-

der petitioner's theory it would receive $274,625, while under the government's theory it would receive $130,000. (Pet. App. A, pp. 33-35; Pet. App. B, pp. 56-59.)

The district court sustained petitioner's contentions. The court of appeals reversed. It held that upon condemnation the government must pay only for legal interests, and that a lessee's expectancy that its lease will be renewed is not a compensable legal interest. Since the government's theory covered all petitioner's legal rights, it ordered that judgment be entered on that basis.

ARGUMENT

It is well established that the compensation that the government is required to pay on condemnation is limited to the value of the condemnee's legal rights in the property taken. In *United States* v. *Petty Motor Co.*, 327 U.S. 372, this Court rejected the market value theory which petitioner urges here in denying a claim for additional compensation for the lessees' renewal expectancy. "The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights" (327 U.S. at 380, n. 9). Instead, the Court held, compensation was to be determined solely on the basis of the remaining lease term. Compare *Omnia Co.* v. *United States*, 261 U.S. 502; *Joslin Co.* v. *Providence*, 262 U.S. 668; *Mitchell* v. *United States*, 267 U.S. 451; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89. The court below correctly applied the rule expressed in *Petty Motor Co.* in sustaining the government's theory, which, as is conceded, fully compen-

sated petitioner for all its legal rights. See also *Scully* v. *United States*, 409 F. 2d 1061 (C.A. 10), certiorari denied, 396 U.S. 876; *United States* v. *677.50 Acres Marion County, Kan. (Clear Creek)*, 420 F. 2d 1136 (C.A. 10), certiorari denied, 398 U.S. 928; *Southern California Fisherman's Ass'n.* v. *United States*, 174 F. 2d 739 (C.A. 9); *Messer* v. *United States*, 157 F. 2d 793 (C.A. 5).

The Court of Appeals for the Second Circuit has expressed a somewhat different view in *United States* v. *Certain Property, Borough of Manhattan*, 388 F. 2d 596, 600-602, where it awarded compensation for fixtures measured by current cost less an allowance for deterioration "computed in the first instance on the basis of useful life and without regard to the term of the particular lease" (*id.* at 601). The court explained that merely because the lessees had short-term leases did not mean that they would not be able "to derive any value from their fixtures beyond the expiration of their leases" (*ibid.*). In effect, the court simply disagreed with the government's computation of an appropriate salvage value for the fixtures when the leases expired. To the extent that the Second Circuit position may be grounded on compensating the lessee for the possibility that his lease might be renewed even though no right of renewal exists, we believe that it is plainly wrong under the teaching of *Petty Motor Co.*

This, we submit, is not a matter which warrants further review at this time. The other courts of appeals have not departed from the rule of *Petty Motor Co.* as a result of the *Borough of Manhattan* decision.

Instead, that decision appears at most to have created an exception applicable only to its special facts. Moreover, a claim was made in the petition for certiorari in the *Scully* case, *supra*, that the Second Circuit's *Borough of Manhattan* decision conflicted with decisions of other courts of appeals. Presumably, the considerations which led the Court to deny the petition in *Scully* also apply here.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

EDMUND B. CLARK,
JACQUES B. GELIN,
Attorneys.

MARCH 1972.

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[1] Conceivably, the Court may wish to delay disposition of this petition pending its decision in *United States* v. *Fuller*, No. 71-559, certiorari granted, January 17, 1972. While we do not believe that the Court's resolution of the question presented in *Fuller* will affect the instant case, there is some similarity in the underlying issues involved.

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